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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No.

SAMUEL SKLAROFF and ANNA SKLAROFF, *Petitioners,*

v.

JAMES SKEADAS and CATHERINE SKEADAS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

SAMUEL SKLAROFF and ANNA SKLAROFF, your petitioners, pray that a writ of certiorari issue to review the judgment of the Supreme Court of Rhode Island entered in the above-entitled case on May 2, 1956.

OPINIONS BELOW

The opinions of the Supreme Court of Rhode Island in this case, on the merits (*infra,* Appendix A, pp. A1-A6) and denying a stay (*infra,* Appendix B, p.

A7), have not yet been reported. The opinion of Mr. Justice Frankfurter, dated May 4, 1956, granting a stay herein, has not yet been reported. The opinions of the Supreme Court of Rhode Island in the related adoption proceeding (*Stevens* v. *Sklaroff; infra,* Appendix D, pp. A9-A19) are reported at 120 A. 2d 694.

JURISDICTION

1. The judgment of the Supreme Court of Rhode Island was entered on May 2, 1956 (*infra,* Appendix C, p. A8).

2. The federal question was set up in petitioners' return in the court below; the relevant excerpts are set out below at p. 10.

3. The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. § 1257(3).

QUESTIONS PRESENTED

The controversy here concerns the custody of a 4½ year old boy who, ever since he was 3 days old, has lived with petitioners in Rhode Island, and has been cared for by them as their own. Petitioners' fitness is not disputed. Pending adoption proceedings brought by petitioners in Rhode Island, the respondents, his natural parents, married in Massachusetts and purported to legitimatize him there. The court below, accepting petitioners' allegations that respondents are unfit persons with an unsavory background, the details of which were set forth, and that a transfer of the child's custody to the respondents would cause illness, would have a lastingly deleterious effect on his normal development, and would be contrary to his best interests, none the less decreed that he be forthwith turned over to the respondents.

The questions presented are:

1. Whether a transfer of custody in those circumstances would be such an act of cruelty as to offend against the Due Process Clause?

2. Whether the giving effect in Rhode Island of the legitimization proceedings in Massachusetts, as against the child present in Rhode Island, would give extra-territorial effect to Massachusetts law in violation of the Due Process Clause?

CONSTITUTIONAL PROVISIONS INVOLVED

1. Article IV, Section 1, provides in pertinent part:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. * * *"

2. Section 1 of the Fourteenth Amendment provides in pertinent part:

> * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *"

STATEMENT

This was an original proceeding for habeas corpus in the Supreme Court of Rhode Island, brought by respondents (petitioners below) to obtain the custody of James Michael Stevens, a 4½ year old child, who had lived with and who had been cared for by the present petitioners ever since he was 3 days old.

The case was heard below on the petition for the writ and the written return thereto, without the taking of oral testimony, and the court below specifically stated (*infra*, p. A2) that "In our judgment even if

we treat all pertinent facts alleged in the return as established, they are not sufficient as a matter of law to justify the court in depriving petitioners [respondents here] of their existing natural right as parents to the custody of their child."

The statement that follows is accordingly drawn from the pleadings in the present cause.

1. *Parenthood.* The child in question was born in Massachusetts on September 22, 1951, to the respondent Catherine Skeadas, then Catherine Stevens, who was then an unmarried woman (Pet., ¶¶ 1-2; Return, ¶¶ 1-2). His name was given as James Michael Stevens (Pet., ¶ 1; Return, ¶ 1). Three days after his birth, and without baptizing the child in her own faith, Catherine Stevens consented in writing to his adoption by the present petitioners, who are citizens of Rhode Island, and caused him to be delivered to them (Return, ¶¶ 3, 20). The child was taken to Rhode Island on the same day, and has lived there with the petitioners ever since (Return, ¶¶ 3, 21). The respondent James Skeadas was then unknown to the petitioners, but, although the natural father, was willing and anxious for the child to be adopted by them (Return, ¶ 20).

Prior to James Michael Stevens' birth, the respondent Catherine Skeadas had been married to one Frank R. Stevens (Return, ¶ 20). Two children were born to them (*id.*). However, in October 1950, they were divorced in Massachusetts, and the mother received custody of the children (*id.*). Thereafter, in December 1951, on Frank R. Stevens' petition, such custody was awarded to him by the Massachusetts courts because Catherine Stevens' care of those children had not been fitting and proper (*id.*).

After James Michael Stevens was born and turned over to petitioners for adoption, Catherine Stevens in 1952 had another illegitimate child by the respondent James Skeadas, and in June 1952, prior to the second illegitimate child's birth, she filed a bastardy complaint against him in Massachusetts, on which he was found guilty in October 1952 but placed on probation (Return, ¶ 20). Finally, on May 1, 1953, the two respondents married in Massachusetts (Pet., ¶ 7), and, a few days thereafter, in purported conformity with the Massachusetts statute, the respondent James Skeadas purported to legitimatize the child James Michael Stevens although said child was then living with petitioners in Rhode Island (Pet., ¶ 8).

2. *The Adoption Proceeding.* Meanwhile, on April 8, 1952, petitioners filed a petition for James Michael Stevens' adoption in the Juvenile Court of Rhode Island, which petition contained the consent of the respondent Catherine Skeadas, then Catherine Stevens (Pet., ¶ 4; Return, ¶ 4). When the petition was heard, in September 1952 (Return, ¶ 5), the respondent James Skeadas was present in court, but he did not make known his paternity of the child, and he did not object to the proceedings nor ask to be made a party thereto (Return, ¶ 5). Adoption was denied (Pet., ¶ 5).

Petitioners then appealed to the Superior Court of the State of Rhode Island, giving notice of the appeal to the respondent Catherine Skeadas, then Catherine Stevens, but not to the respondent James Skeadas, whose identity as the child's natural father was not then known to them, although James Skeadas knew of the appeal (Return, ¶ 6).

While the case was pending in the Superior Court, the petition of Catherine Stevens, for an order directing surrender of the custody of the child was, on May 22, 1953, denied (Return, ¶ 9).

The appeal was heard in the Superior Court before a jury,[1] which, on April 2, 1954, rendered a verdict in favor of petitioners on the issue of whether they were entitled to adopt the child (Pet., ¶ 10; Return, ¶ 10). The jury was directed to answer the following special interrogatory (Return, ¶ 10):

> "(1) If you find, with due regard for the religion of the child, that SAMUEL SKLAROFF and ANNA SKLAROFF are entitled to adopt this child, are you impelled to make such disposition from the facts that this adoption will be for the best interest and welfare of this child in that he will be given a good home, loving parents and full opportunity to develop the best talents which God has given him?"

To this interrogatory, the jury answered "Yes" (Return, ¶ 10).

A motion for new trial by respondent Catherine Skeadas then Catherine Stevens was denied (*id.*). Her petition for permission to visit the child during the pendency of the appeal was denied and dismissed in the best interest of the child in the final decree of the

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[1] By Sec. 18 of c. 1441, R. I. Public Laws of 1944, it was provided that adoption cases in the Juvenile Court of Rhode Island, newly created by that chapter, should follow c. 420, R. I. Gen. Laws, 1938, which had conferred jurisdiction in adoption cases on the several probate courts. Probate appeals were and are governed by c. 573, R. I. General Laws, 1938. Consequently, pursuant to §§ 1, 4, and 17 of the chapter last cited, the adoption case on appeal was heard *de novo* in the Superior Court.

Superior Court, awarding to petitioners custody of the child during the pendency of the appeal, that was entered on August 12, 1954.[2]

On bill of exceptions, the order of adoption was set aside by the Supreme Court of Rhode Island on February 14, 1956, on the ground that, under the Rhode Island adoption statute, the consent of the natural parents was requisite to an adoption; that the subsequent marriage of the child's natural parents legitimatized him and made respondent James Skeadas his father; and that, absent the latter's consent, the child's adoption by petitioners was not authorized by Rhode Island law. A motion for reargument and an application for a stay were severally denied. The opinions of the Supreme Court of Rhode Island are reported at 120 A. 2d 694, and are appended hereto in Appendix D, *infra* pp. A9-A19.

In the principal opinion, the mother was referred to as Catherine Stevens (pp. A9, A13) and the child as James Michael Stevens (p. A9). And the Supreme Court of Rhode Island specifically stated (p. A10) "that the Sklaroffs are respectable people, that they have acted in entire good faith in the matter of the adoption, and that according to the uncontradicted evidence they have always taken proper care of the child."

3. *The present Habeas Corpus Proceeding.* Following dismissal of petitioners' adoption proceeding pursuant to the mandate of the Supreme Court of Rhode

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[2] Chapter 935, R. I. Public Laws of 1940, confers on the Superior Court jurisdiction to award custody and to make other orders, pending an adoption appeal, "as may be for the best interests of such child."

Island, respondents on April 13, 1956, brought the present original proceeding for a writ of habeas corpus in the Supreme Court of Rhode Island. An order to show cause issued on April 16, 1956, and on April 23, 1956, petitioners filed their return.

That return set forth the facts hereinbefore recited, and alleged that respondents had demonstrated that they were not fit persons to have the child's custody (Return, ¶ 20); that a change of custody at this time, when all but 3 days of his 4½ years of life had been spent with petitioners, would bring on a severe illness, would do irreparable damage to his normal development, and would be contrary to his best interests (Return, ¶ 21). Petitioners also averred that a change of custody in the circumstances of the case would violate the Due Process clause of the Fourteenth Amendment, as is more particularly set out below, p. 10.

On the return date, April 23, 1956, petitioners' counsel in open court advised the Supreme Court of Rhode Island that he was ready to proceed with the presentation of oral testimony in support of the allegations contained in petitioners' return. The case was continued, and on April 25, 1956, the Supreme Court of Rhode Island ruled that there was no need for oral testimony, as the petition and return involved only a question of law. Petitioners were ordered to appear, with the child, in the Supreme Court of Rhode Island, on May 2, 1956.

They appeared with the child on that date. The opinion of the Supreme Court of Rhode Island (Appendix A, *infra* A1-A6) was read orally; as indicated above, pp. 3-4; see also p. A2, *infra,* that court

held the allegations of the return insufficient as a matter of law, and concluded (p. A6) that—

> "The prayer of the petition is granted, the peremptory writ of habeas corpus will issue as prayed for, and the respondents [petitioners here] are hereby ordered to forthwith surrender and deliver the said James Michael Skeadas to the petitioners [respondents here], James and Catherine Skeadas."

Final judgment was entered accordingly (Appendix C, *infra*, p. A8).

An application for a stay of final judgment pending the filing of a petition for writ of certiorari was denied, in an opinion set out below in Appendix B, p. A7, but the effective time for transfer of the child's custody was postponed to 10 A. M., May 5, 1956, to permit presentation of a stay application to the Circuit Justice.

Such an application was presented to Mr. Justice Frankfurter on the afternoon of May 2, 1956, and on May 4, he stayed the execution and enforcement of the final judgment below "until May 18, 1956, and in the event a petition for writ of certiorari to review the judgment of the Supreme Court of Rhode Island is filed by May 18, 1956, this stay is to continue until the disposition of such petition by the Court."

HOW THE FEDERAL QUESTIONS WERE RAISED

The federal questions were set forth in petitioners' return to the petition for habeas corpus. After detailed factual allegations regarding the unfitness of respondents as parents (par. 20) and the illness and injury that would result to the child if his custody were

transferred (par. 21), the following federal questions were raised in par. 20 of the return:

(1) "a change of custody * * * in the light of the conduct, character, and persons of the said petitioners [respondents here], would shock the conscience * * * and would run counter to the decencies of civilized conduct, and thereby would be violative of * * * due process clause of the Fourteenth Amendment * * *."

(2) "the subsequent legitimization under Massachusetts law of the said minor child which was physically present in, and a resident of, the State of Rhode Island, is tantamount to giving extraterritorial effect to an act of Massachusetts law to the detriment of an individual physically present in the State of Rhode Island; and that such extraterritorial effect violates the due process clause * * *."

(3) "such acts of marriage and legitimization under the Laws of * * * Massachusetts are not required to be given full faith and credit * * *."

(4) "for the Courts of * * * Rhode Island to hold that the marriage ceremony performed in * * * Massachusetts could affect the status of the said minor child who has always been a resident of * * * Rhode Island * * * would give extraterritorial effect to the said Massachusetts action * * * such * * * effect being prohibited by the due process clause * * *."

(5) "to permit custody of a minor child in Rhode Island to such persons who have been so subsequently married under the laws of * * * Massachusetts would be * * * similarly violative of the due process clause * * *."

REASONS FOR GRANTING THE WRIT

The monstrous cruelty of taking a child of less than five years of age from the arms of those who have lovingly cared for him since he was an infant three days old, of turning that child over to persons who, on allegations accepted by the court below, are unfit persons with an unsavory background, and of taking that step in the face of the similarly accepted allegations that such a transfer will irreparably injure the child's emotional development, offends against the Due Process Clause of the Fourteenth Amendment in several respects.

The factual allegations of petitioners' return deserve more than passing notice.

It was specifically alleged that the respondent Catherine Skeadas "is an unfit and improper person to have custody of the said minor child", and that "the conduct, person, and character of * * * Catherine Skeadas * * * are replete with neglect, desertion, and inefficiency on the part of the said Catherine Skeadas, to be a person to whom custody of the said minor child may be entrusted * * *." (Return, par. 20.) Further (*id.*), "that * * * Catherine Stevens and * * * James Skeadas abandoned the said minor child * * *," and "that the said Catherine Skeadas * * * utterly failed to discharge her duties as a mother toward the said minor child * * *, and that by her continued misconduct forfeited her natural right to the control of the said minor child * * *."

These were not mere conclusory accusations. The same par. 20 of the return alleged that Catherine Skeadas lost the custody of her two children by her first husband, Frank R. Stevens, because "the care

and attention furnished the said minor children by the said Catherine Stevens had not been fitting and proper." It was further alleged that she had two illegitimate children by the respondent James Skeadas, and that she gave the first one to petitioners for adoption (*id.*) and never asserted a claim to it until after petitioners commenced a formal proceeding for its adoption (Return, ¶ 4). It was further alleged that, in respect of the second illegitimate child, the respondent James Skeadas never even contributed to its support until he had been convicted on Catherine's bastardy complaint in the Massachusetts courts (Return, ¶ 20); and that, in respect of the child now in question, James Skeadas was present in the Juvenile Court of Rhode Island when the adoption proceeding was heard there, but did not testify, did not contest the proceeding, did not ask or move to be made a party thereto, and did not even make his identity as the putative father of the child known (Return, ¶ 5).

In their petition for habeas corpus, respondents did not in any respect challenge petitioners' fitness or suitability to retain custody of the child, or attempt to contradict what the court below had said in the adoption case (p. A10), "that the Skarloffs are respectable people, that they have acted in entire good faith in the matter of the adoption, and that according to the uncontradicted evidence they have always taken proper care of the child." Whether that statement, together with the special verdict of the jury in the adoption case that the child's adoption by petitioners would be in his best interest (quoted *supra*, p. 6) and the Superior Court's denial, similarly in the best interest of the child, of the respondent Catherine Skeadas' petition for right of visitation during the pendency of

the appeal, amount to an estoppel by judgment, it is not necessary now to consider,[3] for the reason that petitioners' fitness is not challenged on the record of the present case.

But petitioners' allegation (Return, ¶ 21)—

> "that were the custody of the said minor child taken away from the respondents [petitioners here], such change of custody would have a deleterious effect on the normal and healthy development of the child's personality, and will produce a severe illness, and would severely and lastingly impede the normal development and growth of the said minor child, thereby injuring the best interest and welfare of the said minor child"—

was not and is not contradicted on this record.

The foregoing allegations, of respondents' unfitness and of the injury that a change of custody would do to the child, were held by the court below (p. A2) to be "not sufficient as a matter of law to justify the court in depriving petitioners [respondents here] of their existing natural rights as parents to the custody of their child." And again (p. A4), "even if the allegations of the return were established they would not be sufficient as a matter of law to constitute good cause to defeat this petition and justify this court on this record in divesting parents of the natural

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[3] The Rhode Island law as to collateral estoppel appears to be in accord with this Court's rulings in *Lawlor* v. *National Screen Service Corp.*, 349 U. S. 322; *United States* v. *Moser*, 266 U. S. 236, 241; and *Cromwell* v. *County of Sac*, 94 U. S. 351, 351-353. See, e. g., *Randall* v. *Carpenter*, 25 R. I. 641, 57 Atl. 865; *Probate Court* v. *Williams*, 30 R. I. 144, 73 Atl. 382; *Nardolillo* v. *Carroll*, 70 R. I. 383, 38 A. 2d 781; *Harding* v. *Carr*, 79 R. I. 32, 83 A. 2d 79.

right to the custody of their child in favor of strangers.'"[4]

Thus there is squarely raised the issue whether the transfer of the custody of a child of tender years to unfit persons, where such transfer will result in irreparable injury to the child, contravenes the Due Process Clause. We submit that it does.

1. Up to now, the Rhode Island law has been that, in child custody cases, the welfare of the child is paramount, and that it accordingly prevails over merely biological claims to custody. *United States* v. *Green*, 3 Mason 482, Fed. Case No. 15,256 (C.C.D.R.I., 1824; Story, J.); *Hoxsie* v. *Potter*, 16 R. I. 374, 17 Atl. 129; *Hope, Petitioner*, 19 R. I. 486, 34 Atl. 994; *Rhode Island Society, etc.* v. *Hueston*, 22 R. I. 62, 46 Atl. 180; *Des Marais for Writ of Habeas Corpus*, 71 R. I. 165, 42 A. 2d 893. Rhode Island has, of course, the right to change its law of domestic relations. Rhode Island may, without constitutional impediment, determine after hearing evidence that the non-parents have not sustained the burden resting on them to establish that the parents have abandoned their rights or that the parents are unfit to assume the duties and privileges of parenthood. Cf. *People ex rel. Kropp* v. *Shepsky*, 305 N. Y. 465, 113 N. E. 2d 801, cited at pp. A3, A4. But neither Rhode Island nor any other State may,

[4] Insofar as other passages of the opinion suggest that the respondent Catherine Skeadas is now reformed (p. A4), the short answer is that these expressions do not rest on evidence, since as has been shown (*supra*, p. 8), petitioners were not permitted to present evidence. Yet the Rhode Island practice in other habeas corpus cases brought in the Supreme Court of that state has been to take testimony in open court. See *Des Marais for Writ of Habeas Corpus*, 71 R. I. 165, 166, 42 A. 2d 893.

consistently with the Due Process Clause, perpetrate the act of cruelty that the judgment under review plainly involves.

The basic allegation (item (1), *supra*, p. 10; Return, ¶ 20) that "a change of custody * * * in the light of the conduct, character, and persons of said petitioners [respondents here], would shock the conscience, would offend the sense of justice, and would run counter to the decencies of civilized conduct, and would therefore be violative of * * * the due process clause of the Fourteenth Amendment," was, as the context indicates, drawn from *Rochin* v. *California*, 342 U. S. 165.

Petitioners submit that, however shocking it is for a State to send an adult user of narcotics to jail for sixty days after forcibly pumping his stomach, it is far more shocking when a State does violence to the ties of care and love and understanding that have surrounded a 4½ year old child since it was 3 days old, and turns that child over to unfit persons with a sordid past, in the face of an allegation, accepted as true by the State's highest court, that such a transfer will have a deleterious effect on the child, will produce a serious illness, and will severely and lastingly impede his normal development. Certainly the burden that the change of custody will impose on the child whose fate is now in question is at least equal to the burden imposed on Negro children of the District of Columbia by segregation in public education, which was held in *Bolling* v. *Sharpe*, 347 U. S. 497, 500, to violate the Due Process Clause of the Fifth Amendment.

Parental rights are not absolute, as both the court below (*Matarese* v. *Matarese*, 47 R. I. 131, 133, 131 Atl. 198, 199) and this Court have held (*Prince* v.

Massachusetts, 321 U. S. 158, 166, 168). And, since those rights are not proof against the power of the State, *a fortiori* they are insufficient to withstand the command of the Federal Constitution. Yet, by the ruling below, the custody of the child will be transferred to persons who are, in fact (Return, ¶ 21), total strangers to it,[5] as though the issue here were the title to a chattel rather than the future welfare of a human being.

This Court has said that the Due Process Clause requires of the States all that is "implicit in the concept of ordered liberty" (*Palko* v. *Connecticut,* 302 U.S. 319, 325), and that "due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights" (*Wolf* v. *Colorado,* 338 U. S. 25, 27). This Court has also had occasion to point out that matters relating to the custody of children are not to be dealt with simply as mere property rights. *May* v. *Anderson,* 345 U. S. 528, 533, 536.

We submit that, on this record, the action of the court below involves an obvious violation of the very essence of Due Process of Law. And the issue was squarely and necessarily passed upon, because, assuming that respondents' marriage in Massachusetts could affect the status of the child living with petitioners in Rhode Island, the gravamen of the allegations of the

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[5] "• • • the said minor child, James Michael Stevens, has continuously resided with your respondents [petitioners here], in the City of Providence, Rhode Island, continuously, and without interruption, from September 25, 1951, three (3) days after his birth, to the present time, and has known his own identity as Fred Sklaroff, and has believed, and does now believe, the respondents [petitioners here] to be his parents • • •."

return was that a transfer of his custody would, in the circumstances alleged, contravene the Due Process Clause. Consequently the order of the court below, directing a change of custody in the face of the allegations raising that federal question, and in the light of its two opinions (Appendix A, pp. A1-A6; Appendix B, p. A7), necessarily involved a decision thereon.

2. But the assumption just stated is one for purposes of argument only, and in their return petitioners attacked the constitutional validity of the assumption that, by an act done in Massachusetts, respondents could affect the status and welfare of a child present in Rhode Island. See items 2-5, *supra*, p. 10. Succinctly stated, petitioners' contention is that the holding that, by marrying in Massachusetts, respondents could reclaim as their legitimate child an infant whom they had relinquished to petitioners and who was living with petitioners in Rhode Island at the time of respondents' subsequent marriage in Massachusetts, would be tantamount to giving extraterritorial effect to the law of Massachusetts, in a way not required by the Full Faith and Credit Clause, and would therefore additionally contravene the Due Process Clause.

It is plain that the Full Faith and Credit Clause does not require one State to give effect to an adoption effected in another State. *Olmsted* v. *Olmsted*, 216 U. S. 386. And Rhode Island has held that the status of guardian and ward existing in Rhode Island is not sufficient to preclude the ward from acting in Massachusetts as one who is *sui juris*, *Chace, Petitioner*, 26 R. I. 351, 58 Atl. 978, although Rhode Island has given effect to a legitimization abroad by subsequent marriage of the parents where the child sought

to be affected was with the parents at the time. *DeWolf* v. *Middleton*, 18 R. I. 810, 817, 31 Atl. 271, 272.

The situation here is quite different. The act of subsequent marriage in the present case, and the purported legitimatizing of the child here in question, were both done in Massachusetts, at a time when the child was and had been with petitioners in Rhode Island. Thus Massachusetts law is extraterritorially affecting the child's status, to the detriment of its welfare on the allegations of the return that the court below accepted as true.

True, for many purposes the domicile of an illegitimate child is that of its mother. Restatement, *Conflict of Laws*, § 34; cf. *id.*, § 14 (domicile of origin); § 33 (abandoned child). But to speak of the child's domicile in the present context as being in Massachusetts when ever since he was three days old he had, with the consent of both parents then expressed, been with petitioners in Rhode Island, is to deal in terms of a fiction. The fact of the matter is that Massachusetts law is being exerted to affect rights in Rhode Island. And we submit that, in the context of the present case, such extraterritorial effect would contravene the Due Process Clause just as plainly as if the Massachusetts courts or the Massachusetts legislature had sought to do so in terms.

Even when only property is in question, the Due Process Clause forbids a State to tax property located, or transactions taking place, outside its borders. E.g., *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1; *Miller Bros. Co.* v. *Maryland*, 347 U. S. 340. Where the property involved is intangible in nature, different considerations appear to apply, though some connection

between the taxing state and the taxed property is still required. E. g., *Curry* v. *McCanless*, 307 U. S. 357; *Greenough* v. *Tax Assessors*, 331 U. S. 486, affirming 71 R. I. 477, 47 A. 2d 625. Rights to the custody of children can hardly be treated as comparable to property of any description (*May* v. *Anderson*, 345 U. S. 528, 533, 536), and in the somewhat related case of *Yarborough* v. *Yarborough*, 290 U. S. 202, it was held that South Carolina could not subject the South Carolina property of a Georgia father to the support of his child who was resident in South Carolina. A reading of the opinion, in the light of the dissent of Stone and Cardozo, JJ., suggests that a refusal to give extraterritorial effect to the later South Carolina proceeding was as determinative in the result as any requirement that the earlier Georgia proceeding fixing the father's obligation be accorded full faith and credit in South Carolina.

We think that the same reasoning precludes giving effect, in Rhode Island, to the purported Massachusetts legitimization involved in the present case. And we think it significant, as showing the need for abandoning fictitious concepts in situations of this nature, that the Rhode Island law requires adoption proceedings to be brought in the place of residence of the persons petitioning for adoption, regardless of the "domicile" of the child whose adoption is sought. R. I. General Laws 1938, c. 420, § 1. Prior to the amendment effected by c. 1573 of R. I. Public Laws of 1930, the rule in Rhode Island had been the other way. *Greene* v. *Willis*, 47 R. I. 375, 133 Atl. 651.

3. The particularly outrageous circumstances of the present case, together with the need for marking the

boundaries of State powers over adoption and legitimization at a time when family life is fluid and interstate migration is the rule rather than the exception, combine to emphasize the desirability of having the ruling below reviewed by this Court.

CONCLUSION

For the foregoing reasons, the foregoing petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1956.

APPENDIX A

OPINION BELOW

M. P. No. 1176

JAMES SKEADAS ET UX.

v.

SAMUEL SKLAROFF ET UX.

OPINION

PER CURIAM. This petition for a writ of habeas corpus was brought by the natural parents of James Michael Skeadas to obtain their four and one-half year old child who is being detained by the respondents. Pursuant to a citation to show cause why the prayers of the petition should not be granted, the respondents appeared on the return day thereof and filed a pleading entitled "Return or Statement" to the petition. Thereupon the case was continued to April 25, 1956 to permit the justices of this court to familiarize themselves with the contents of such return.

When our examination of the pleadings disclosed that the case presented only an issue of law, we heard counsel for petitioners and respondents respectively in oral argument as to the principles of law which should govern. At the conclusion thereof the case was continued to May 2 to permit counsel to file briefs in support of their oral arguments and these were duly filed.

The above-mentioned return as filed by respondents is lengthy and argumentative. Generally speaking it renews in substance and effect the claims relied on to support their petition for adoption of this child, which petition was denied and dismissed in *Sklaroff* v. *Stevens*, R. I. , 120 A. 2d 694. It contains further allegations of facts and law which are contrary to that decision; other allegations based upon a misconception of the effect of the Massachusetts statute

under which petitioners legitimatized this child; and certain other assumptions, conclusions and argumentative assertions in an effort to support a unique claim that the child by his legitimization was deprived of rights under the due process clause of the fourteenth amendment to the United States constitution, and that the full faith and credit clause thereof was violated. It further asserts certain alleged moral lapses by the petitioners which happened four or five years ago and before their lawful marriage.

After examination and careful consideration of the allegations in both the return and the petition, together with the oral arguments and briefs submitted by counsel for the parties, we are unanimously of the opinion that respondents have not shown cause to constitute a defense to this petition. In our judgment even if we treat all pertinent facts alleged in the return as established, they are not sufficient as a matter of law to justify the court in depriving petitioners of their existing natural right as parents to the custody of their child.

It should be noted that this proceeding is not between parties to a divorce, or between parents and others having a legal right to custody, such as for example a guardian or one standing *in loco parentis*. The petitioners here are the parents of the child in fact and law, whereas the respondents are not related to him by blood or affinity. Nor do they have a decree or judgment of any court of competent jurisdiction which would clothe them with a present legal right to his custody.

The right of petitioners to such custody is not one which is created by the state or by decisions of courts. The right derives from the nature of the parental relationship. It has come down from ecclesiastical and civil law until it has been accepted by tradition and evidenced by decisions from time immemorial as the legal right of the parents. See *Matarese* v. *Matarese*, 47 R. I. 131. See also *Pierce, Governor of Oregon* v. *Society of Sisters*, 268 U. S. 510.

Consequently the state may not arbitrarily take away from parents their natural right to custody and give it to a stranger. We held in a recent case, *DesMarais for Writ of Habeas Corpus*, 71 R. I. 165, at page 167: "In determining the delicate and often perplexing question of the custody of a child as between a mother and third persons, it is incumbent upon all who are bound to decide such question to proceed with caution and to act only upon clear proof, lest, in a given case, violence be done to the tie of nature that binds mother and child."

Each case must be determined on its own facts. Naturally in a case involving custody the court, as *parens patriae*, is always concerned with the best interests of the child. But in the absence of proof to the contrary a child's best interest is primarily served by being left with his natural parents in a family unit. Unless it is shown clearly that by abandonment or other conduct or conditions the parents are presently unfit and unable to discharge their parental duties to the child according to law, a court should consider the welfare of the child with due regard for the superior rights of fit and suitable parents. *Lakey* v. *Gudgel*, 158 Neb. 118.

It is frequently held that in awarding custody the parents' right is not absolute and may be regulated by the state for cause and in the best interests of the state and the child. When properly understood this principle does not preclude the court from giving effect also to the primary right of the parents which is superior to that of strangers. In any event whatever may be said when the case is between parents and others legally entitled to custody, that rule is subject to qualification where a stranger seeks to divest the parents of their existing natural right to the custody of their own child. *People ex rel. Kropp* v. *Shepsky*, 305 N. Y 465 (1953); *Norval* v. *Zinsmaster*, 57 Neb. 158. Any other rule would tend to destroy the fundamental safeguards of parents and of the family, which are at the base of our society and our form of government.

In the instant case the respondents in their return significantly allege no fact tending to show that since the marriage of petitioners in 1953 either of them has been guilty of any immoral or questionable conduct; or that they have failed to maintain a clean, comfortable and proper home; or that they have not been kind and faithful parents bringing up their children properly in accordance with correct legal and moral standards; or that there is any existing fact by which petitioners are shown to be *presently* unfit and unable to discharge their parental obligations to this child according to law.

The allegations which are relied upon, and which are amplified at great length in respondents' return and argument, concern alleged misconduct of one or both of the petitioners long before they were lawfully married and had expressly legitimatized the child in accordance with the law of Massachusetts. In a recent habeas corpus case which states our view of the governing law, similar evidence of long past misdeeds was held to be insufficient as a matter of law to defeat the parents' petition for such writ. *People ex rel. Kropp* v. *Shepsky, supra.*

Further there is no question here of abandonment. The mother of the child almost from the date she left the hospital after his birth has been fighting persistently and legally to obtain his return. She has made reparation for her past misdeeds as far as it is humanly and legally reasonable to do so. Any present attachment of respondents is not chargeable to petitioners' abandonment or delay. Therefore even if the allegations of the return were established they would not be sufficient as a matter of law to constitute good cause to defeat this petition and justify this court on this record in divesting parents of the natural right to the custody of their child in favor of strangers. *People ex rel. Kropp* v. *Shepsky, supra.*

The respondents' attempt to raise a federal question by alleging and arguing that the provision of Massachusetts

law permitting the legitimatizing of the child has no extra-territorial effect; that by approving the action thereunder as taken by petitioners, while the child was physically in Rhode Island, he is thereby deprived of rights in violation of the due process clause of the fourteenth amendment to the United States constitution; and that in brief summary he is entitled not to be deprived of an alleged constitutional right to be, to remain and to be treated as an illegitimate child.

This unique statement and unsupportable claim is enough to condemn it without further consideration. However, in dismissing respondents' petition for adoption we have held that James Michael Skeadas was in fact and law the legitimate child of these petitioners for all purposes under the laws of Massachusetts, and that our statute is substantially the same. When the parents were lawfully married and further specifically legitimatized their child under the Massachusetts statute, general laws of Massachusetts, 1-A Mass. Anno. Laws, chap. 46, 13, the *legal domicile* of the parents and child was within that state. By such action the child became legitimate *as of the time of his birth* and all public records to the contrary were removed by virtue of that statute's mandatory terms. Restatement of the Law, Conflict of Laws, chap. 5, 139, Legitimatation from Birth, p. 206. It is a strange contention, to say the least, that action taken under such a beneficent statute to clothe the child with the legal right to a name, to care, support and education, and to inherit through his father as well as his mother, amounts to depriving him of anything, much less of a constitutional right. This contention has no merit.

The respondents also seem to misconceive the purpose and effect of the full faith and credit clause of the United States Constitution. We are not precluded thereunder from giving effect to a statute of Massachusetts by comity, or by adopting its decree thereunder as our own provided

there is no contravention of statute or public policy of this state. There is none. *McKeel* v. *McKeel*, 185 Va. 108.

Indeed we held in our previous opinion that in purpose and provisions the Massachusetts statute was substantially the same as the law of this state, and further in denying respondents' motion for a stay under the United States Code, Tit. 28, U. S. C. A., 2101 (f), we pointed out that there was no federal question here involved. We find nothing in the Rhode Island cases cited by respondents inconsistent with the law as above stated so as to require a different conclusion.

In the circumstances, therefore, we are of the opinion that on the record before us the respondents have failed, as a matter of law, to discharge their burden of showing legal cause why the petition of the natural parents should not be granted.

The prayer of the petition is granted, the peremptory writ of habeas corpus will issue as prayed for, and the respondents are hereby ordered to forthwith surrender and deliver the said James Michael Skeadas to the petitioners, James and Catherine Skeadas.

APPENDIX B

OPINION BELOW DENYING A STAY

M. P. No. 1176

JAMES SKEADAS ET UX.

v.

SAMUEL SKLAROFF ET UX.

OPINION

PER CURIAM. In the above-entitled case, following our opinion granting the prayer of the petitioners for a writ of habeas corpus and our order that the judgment be executed immediately, the respondents filed an application for a stay of execution thereof under the provisions of Title 28, United States Code Annotated, § 2101 (f).

A similar application was made after we denied the respondents' motion for reargument of the original opinion denying and dismissing the respondents' petition for adoption. *Sklaroff* v. *Stevens*, R. I. , 120 A. 2d 694. We then held that no substantial federal question was raised within the obvious purpose of the express language of said Tit. 28, U.S.C.A., § 2101 (f). Accordingly on March 2, 1956 that application for such a stay was denied.

Now, after a hearing and further consideration of the arguments of counsel as applied to the instant proceeding and application, we are of the opinion that, despite the strained effort by respondents, no violation of any proper constitutional right of the child has been alleged or shown, and no proper and substantial federal question reviewable by the United States Supreme Court is actually and reasonably raised so as to warrant the granting of a stay under said Title and Section of the United States Code Annotated.

The application for a stay of execution is therefore denied, and our judgment and order dated May 2, 1956 will be executed immediately in accordance with the terms thereof.

APPENDIX C

JUDGMENT BELOW

M. P. No. 1176

JAMES SKEADAS ET UX.

v.

SAMUEL SKLAROFF ET UX.

JUDGMENT AND ORDER

In the above entitled case, upon consideration of the petition for a writ of habeas corpus and the respondents' return thereto, and pursuant to the opinion rendered thereon May 2, 1956, it is hereby adjudged that the prayer of the petition is granted, the peremptory writ of habeas corpus will issue as prayed for, and the respondents are hereby ordered to forthwith surrender and deliver the said James Michael Skeadas to the petitioners, James and Catherine Skeadas.

Entered as the judgment and order of this court this second day of May, A. D. 1956.

By order:

/s/ FRANK E. MCKENNA
Assistant Clerk

APPENDIX D

OPINIONS IN ADOPTION CASE. 120 A. 2d 694

(1) Original Opinion

Ex. &c. No. 9557

SAMUEL SKLAROFF ET AL.

v.

CATHERINE STEVENS.

OPINION

CAPOTOSTO, J. This petition for the adoption of James Michael Stevens, respondent's infant son, was commenced in the juvenile court under the provisions of general laws 1938, chapter 420, 1, as amended by public laws 1944, chap. 1441, sec. 36. Following a hearing in that court the petition was denied and dismissed. From a decree entered in accordance with that decision Samuel Sklaroff and his wife Anna appealed to the superior court, where a jury returned a verdict in their favor. The motion of the respondent Catherine Stevens for a new trial was later heard and denied. The case is before us on her exception to the denial of that motion and on various other exceptions to rulings during the trial, the most important of which is the one to the denial of her motion to dismiss the petition for want of jurisdiction. Hereinafter we will sometimes refer to the Sklaroffs as the petitioners and to Catherine Stevens as the respondent, or Catherine, or by her present married name of Catherine Skeadas.

Upon a close examination of the record before us we are convinced that the trial justice was clearly wrong in denying respondent's above-mentioned motion to dismiss, which fundamentally rested on the absence of the consent necessary for the adoption of a child under the laws of this state. The evidence in support of that motion is undisputed, unimpeached and conclusive. In such a situation it

is sufficient for our purposes to state only the controlling facts concerning the motion to dismiss. We therefore intentionally omit, as far as possible, reference to all of the remaining and extensive evidence, particularly that of two intermediaries residing in Massachusetts whose testimony is not free from suspicion, coercive inducement, or other questionable conduct.

The Sklaroffs are domiciled residents of Providence in this state. Catherine Stevens, an unmarried woman, had her domicile and residence in Lynn, Massachusetts, where on September 22, 1951 she gave birth to James Michael Stevens. The putative father was James Skeadas. On September 25, or three days after the baby was born, Catherine apparently with considerable reluctance, as she had theretofore been urging Skeadas to marry her, signed a paper in the presence of a Lynn attorney consenting to the adoption of her child by certain indefinitely described persons. It is unnecessary to relate how this attorney came to contact Catherine and what he did in conjunction with another attorney of Boston, Massachusetts, in placing the child with the Sklaroffs. However, we deem it proper to observe at this point that the Sklaroffs are respectable people, that they have acted in entire good faith in the matter of the adoption, and that according to the uncontradicted evidence they have always taken proper care of the child.

Soon after the child had been turned over to the Lynn attorney in Massachusetts, Catherine, and also Skeadas underwent a revulsion of feeling respecting what they had done. A more considered decision took the place of impulsive conduct. For some time thereafter they negotiated with the Lynn attorney, and through him with the attorney in Boston, for the return of the child to Catherine. These efforts proved unsuccessful because certain substantial financial demands, which apparently they could not meet, were insisted upon as necessary to obtain the return of the child.

The petition for adoption in the instant case was filed in the juvenile court of this state on April 8, 1952, at or about which date Catherine first learned of the whereabouts of her child. Ever since that time she has contested the petition on the ground that her alleged consent to the adoption by the Sklaroffs or anyone else was not her free act and deed. As already indicated, the Sklaroffs appealed from a decree of the juvenile court denying and dismissing the petition and brought the case to the superior court. The citation was ordered by that court, which Catherine duly answered, was returnable April 4, 1953. Following certain collateral proceedings, the case came on for trial on March 23, 1954 and ended on April 2, 1954.

We now come to a matter that is of basic importance in passing on respondent's motion to dismiss the case for want of jurisdiction. Between the time of the hearing and denial of the petition in the juvenile Court and the trial in the superior court Skeadas married Catherine. A certified copy from the record of marriages of the city of Lynn, Massachusetts, which is in evidence as respondent's exhibit B, shows that James Skeadas and Catherine E. Stevens were married in that city on May 1, 1953. It also appears from uncontradicted evidence that three days after the marriage Skeadas and Catherine, acting under the general laws of Massachusetts, 1-A Mass. Anno. Laws, chap. 46, 13, went to the city clerk in Lynn and had the name of the child changed from James Michael Stevens to James Michael Skeadas. At the trial in the superior court Skeadas, as the then father of the child both in fact and in law, strongly objected to the granting of the petition. He had never signed any written consent to such adoption. There is also independent evidence to the effect that James and Catherine Skeadas have another child, Dennis George Skeadas, and that they maintain a clean and comfortable home in a good neighborhood.

The adoption of children was unknown to the common law in England. It came into the laws of this state solely

by virtue of statute. *Greene* v. *Willis,* 47 R. I. 251, 254; *Union Trust Co.* v. *Campi,* 51 R. I. 76, 81. Since such a statute is in derogation of the common law it is generally held that, at least as to all directions pertaining to manifest essentials, its provisions must be strictly construed and literally applied. See *Batcheller-Durkee* v. *Batcheller,* 39 R. I. 45.

A principal objective of the pertinent statutes of Massachusetts and Rhode Island is to protect a child born out of wedlock against adoption under improper conditions, to help him acquire by operation of law the status of a child born in lawful wedlock and in so far as practicable to expunge from the birth records of the place where he was born any reference to illegitimacy. To that end the general laws of Massachusetts, 1-A Mass. Anno. Laws, chap. 46, 13, hereinbefore mentioned, provides: "If a person shall have acquired the status of a legitimate child by the intermarriage of his parents and the acknowledgement of his father," the record of his birth shall be amended or supplemented so as to read in all respects "as if such person had been reported for record as born to such parents in lawful wedlock." That section further provides that a copy of such record shall certify to the facts as amended and shall not indicate "that the record has been corrected, amended or supplemented."

The comparable provisions of our statute are substantially the same. General Laws 1938, chap. 42A, 13, as amended by P. L. 1944, chap. 1394, reads as follows: "Illegitimate children shall become legitimatized by the subsequent marriage of their parents to each other, and the issue of marriages declared null in law shall nevertheless be legitimate, and in such case the city or town clerk having custody of the birth records at the request of either parent, or the child so legitimatized, shall make any changes necessary in order to remove from said records any evidence of illegitimacy."

The indisputable evidence in the instant case clearly established that Catherine's illegitimate child was legitimatized by the subsequent marriage of the parents, the acknowledgment of paternity by the father, and the express action of the parents in amending the birth records in accordance with the law of Massachusetts, where at all times the child's domicile remained. Such action to legitimatize the child are also in accordance with the law of Rhode Island, where the child is presently in the custody of the Sklaroffs. At the time of the trial in the Superior court it conclusively appeared that the illegitimate child of Catherine Stevens had become, by act of the parents in compliance with law, the *legitimate* child of James and Catherine Skeadas. Such fundamental change in the status of the child is of vital importance in this case.

Since the present proceedings for adoption were instituted in this state, the procedure to be followed in order to give our courts jurisdiction in the matter must be in strict accordance with the requirements of the pertinent statute. A petition for leave to adopt a child is governed by G. L. 1938, chap. 420. Section 2 of that chapter provides: "That parents of the child, or the survivor of them, shall * * * consent in writing to such adoption, or such petition shall be dismissed." This provision of 2 requires no interpretation. In clear and positive language it commands that a petition for adoption shall be dismissed unless both parents, if living, shall have given their consent in writing to the adoption.

In the case at bar, assuming that Catherine, the child's mother, at the time she was not married to Skeadas did sign a paper consenting to the adoption of her newly-born son and that her consent thereto was entirely voluntary, as petitioners contend, yet when the petition for adoption came on for final adjudication on the merits by the superior court such petition was inadequate to give jurisdiction in the matter to that court because of noncompliance with

the express mandate of the statute. The marriage of Catherine to James Skeadas, the subsequent acknowledgment by the latter that he was the child's father, and their express action to legitimatize the child according to the statute in Massachusetts resulted in completely changing the status of the child to that of legitimacy for all present purposes. Consequently it required the consent in writing by the father as well as the mother to the adoption before a petition for that purpose could be entertained by the court. From the undisputed evidence in the present record it clearly appears that the father not only did not consent in writing to the adoption, as required by statute, but also that, joining with his wife who contended that her consent was involuntary and under conditions akin to duress, he firmly opposed the granting of the petition.

Although one may sympathize with the Sklaroffs for the hardship resulting to them, nevertheless it is our judgment that in the peculiar circumstances of record the trial justice erred in denying respondent's motion to dismiss the proceedings for want of jurisdiction. In allowing the case to go to the jury without the petition for adoption having been voluntarily consented to in writing by *both parents*, as the statute requires, and especially in the face of the father's opposition under oath, the trial justice ignored the basic mandatory requirements of the statute as to the adoption of the child who was then legitimatized under the law.

For the reasons stated, the respondent's exception to the denial of her motion to dismiss the petition for adoption is sustained, and the case is remitted to the superior court with direction to grant said motion to dismiss for want of jurisdiction and thereupon to transmit the case to the juvenile court for entry of a decree in accordance with this opinion.

(2) Opinion Denying Reargument

Ex. &c. No. 9557

SAMUEL SKLAROFF ET AL.

v.

CATHERINE STEVENS.

OPINION

PER CURIAM. After the opinion in the above-entitled case was filed the petitioners requested and received permission to file a motion for reargument. It sets forth at some length the reasons for their contention that the case should be reargued before the court as presently constituted.

The unanimous decision of the court in this case was actually entered in the clerk's office on January 17, 1956 at 11 a.m. Subsequently the opinion, which merely sets forth the reasons for that decision, was filed on February 14 as of January 17, 1956. Meanwhile, however, three new justices had been elected and qualified to fill the vacancies caused by the resignations of three of the five justices who had participated in such decision. Apparently the attorneys for the petitioners recognize these facts, which are matters of record.

It is well settled that a motion to reargue is not filed as of right but is addressed to our discretion. Nevertheless, in the special circumstances referred to, the court as presently constituted has granted permission to petitioners to file the motion and accordingly has examined the reasons recited therein, the decision entered January 17, 1956, and the explanatory opinion which was later filed as of that date.

After consideration we are unanimously of the opinion that a considerable part of the motion for reargument deals with certain evidence and issues which are not material to the basis of our decision; that the motion does not point

out wherein such decision, as explained by the opinion, misconceived or misapplied the law of this state governing adoption, general laws 1938, chapter 420, 2; that such motion does not point out any pertinent question of law or material argument which the court overlooked or failed to consider in reaching the decision which was entered January 17, 1956; and that none of the reasons relied on warrants a reargument of or a change in that decision.

It is unnecessary to repeat that such decision was based on a question of law as to the superior court's want of jurisdiction under the pertinent statute; that the unequivocal provisions of such statute mandatorily require the voluntary consent in writing of *both* parents of a child before a court has jurisdiction thereunder to decree a final adoption; that *before* the hearing in the superior court the mother and father of the child had legally married and had expressly acknowledged and legitimatized the child according to law; and that the written consent of the father to the petition for adoption never was given.

In the undisputed circumstances of record the child was legitimate at the time of the trial. Accordingly the superior court did not have jurisdiction under the statute to proceed, without the consent of both parents, to adjudicate and decree a final adoption of the child. We therefore held that it was error for such court to deny the timely motion of the respondent to dismiss the petition on that ground. We now affirm such decision.

The motion is denied.

(3) Opinion Denying Stay

Ex. &c. No. 9557

SAMUEL SKLAROFF ET AL.

v.

CATHERINE STEVENS.

OPINION

PER CURIAM. This is an application, pursuant to the provisions of Title 28, United States Code Annotated, 2101 (f), for a stay of final judgment in the above-entitled case. It was presented for our consideration in the event that the motion of the petitioners for a reargument should be denied.

Since we have denied such motion in our opinion filed this day in Samuel Sklaroff et al. v. Catherine Stevens, Ex. No. 9557, we shall consider the petitioners' request for a stay of final judgment as prayed for in the instant application. The section of the United States Code relied on, Tit. 28, U. S. C. A., 2101 (f), begins and reads in part as follows: "In any case in which the final judgment or decree of any court *is subject to review by the Supreme Court* on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court." (italics ours)

No question involving an alleged violation of the rights of the petitioners under the United States constitution was raised by them on the record either at the trial in the superior court or on review in this court. In our judgment no question even remotely related thereto can reasonably be raised in connection with our decision entered January 17, 1956, which was explained by the opinion filed February 14 as of January 17, 1956.

Certainly the petitioners acquired no constitutionally vested rights as to the child merely because they filed a petition for adoption, which incidentally was denied in the first instance by the juvenile court for want of the voluntary consent of the mother. The matter of adoption is wholly statutory. At the time the instant petition was filed and tried it was governed by general laws 1938, chapter 420. The provisions of 2 of that statute mandatorily required the voluntary and written consent of *both* parents before a court could properly enter a decree of final adoption.

It is undisputed that *before* the trial in the superior court the mother and father of the child had legally married in Massachusetts where both were domiciled residents; that they also, under a specific statute of that state, had acknowledged and legitimatized the child and changed his name; that such statute is essentially the same as the law of Rhode Island, G. L. 1938, chap. 424, 13, as amended by public laws 1944, chap. 1394; and that the father of the child had never signed a written consent to the petition for adoption. It further appeared that he never was made a party respondent to the petition and that he testified under oath in the superior court and strongly objected to the granting of such petition.

Therefore on the undisputed record the child was legitimate at the time of the trial and both parents had not consented to the petition. Without the consent of both parents, the superior court had no jurisdiction to proceed to adjudicate the petition and to enter a decree of final adoption of such child, especially in view of respondent's timely motion to dismiss the petition for want of jurisdiction.

Having in mind the undisputed facts of record and the jurisdictional basis of our decision under this state's controlling statute as to adoption, the claim of petitioners to a vested right in the child is without any foundation. Nor can they, who had a full hearing and review, properly claim

any deprivation of due process of law. In our opinion no possible question under the federal constitution which would be reviewable by the United States Supreme Court on certiorari can reasonably be raised on this record. As we view Title 28, United States Code Annotated, 2101 (f), above quoted, it is necessary for the petitioners to show that they are aggrieved by the violation of a right under the United States constitution in order to bring themselves within the express language and purpose thereof.

We are of the opinion, therefore, that in the absence of any such showing in the record the petitioners' application for a stay of final judgment as prayed for should be and it is hereby denied.

MAY 24 1956
HAROLD B. WILEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 952

SAMUEL SKLAROFF AND ANNA SKLAROFF, *Petitioners,*

v.

JAMES SKEADAS AND CATHERINE SKEADAS, *Respondents*

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 952

SAMUEL SKLAROFF AND ANNA SKLAROFF, *Petitioners,*

v.

JAMES SKEADAS AND CATHERINE SKEADAS, *Respondents*

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Supreme Court of Rhode Island is not reported, but may be found in Appendix A to the Petition (A1-A6). Opinions of the Supreme Court of Rhode Island, filed February 14, 1956 and March 2, 1956, in related adoption proceedings are reported at 120 A.2d 694, et seq., and may be found in Appendix D(1), (2), (3) of Petition A9-A19.[1]

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[1] Hereinafter designated as Pet. The Petition for Writ of Habeas Corpus filed in the court below is hereinafter designated as Pet. H. C. Certified portions of transcript in the related adoption case are filed with the Clerk of this court and hereinafter designated as Tr.

JURISDICTION

The judgment of the Supreme Court of Rhode Island was entered May 2, 1956 (Pet., A8). Application for stay of execution (see Record filed by Petitioners) was denied with opinion by the court below on May 2, 1956 (Pet., A7). Under order of Mr. Justice Frankfurter granting limitedly petitioners' application for stay to this Court, petition for a writ of certiorari was filed May 17, 1956. Mr. Justice Frankfurter filed a written opinion in which he stated in part:

> "The time for determining the very narrow issues which I have formulated, namely, whether a petition for certiorari in this case would commend itself to at least four members of this Court, should be as short as possible. It certainly should not extend beyond this Term of Court. I shall therefore grant a stay, for a period which will expire fourteen days from the filing of this memorandum in the Clerk's Office, unless by that time the petitioners will have filed with the Clerk of this Court a petition for certiorari. In that event the stay will continue until the disposition of such petition by the Court. (Such a petition may, if convenient, be in typewritten form.) Upon the filing of such a petition it will be for the respondents, if they so choose and for which they will have had ample time, to file a response in time sufficient for the petition to be disposed of before the usual adjournment of this Court in June."

The jurisdiction of this Court has been invoked under 28 U.S.C., Section 1257(3).

QUESTIONS PRESENTED

1. Whether petitioners have standing to assert a claimed constitutional right of the infant, James Michael Skeadas.

2. Whether the petition for writ of certiorari presents any federal question, let alone a substantial federal question.

3. Whether the infant was deprived of liberty without due process of law by the decree of the court below requiring petitioners, neither of whom is related to him by blood or affinity nor entitled to custody by judicial decree, to return him to the custody of his natural parents who, as the state court determined, are fit and able to perform their parental obligations.

With reference to the questions presented, it is important to note that in the court below petitioners asserted in Par. 20 of the Return, five purported federal questions which were deemed of no merit (Pet. A4-6). These same five questions were raised in the Application for Stay in the court below and the court below by its opinion and order denied the stay (Pet. A7). In the Application for Stay addressed to Mr. Justice Frankfurter, the same five questions were relied upon and Mr. Justice Frankfurter set them out verbatim in his opinion.

However, in the petition for writ of certiorari, in the process of distilling the same five questions into two questions, (Pet., p. 3) petitioners have raised in veiled form an additional purported federal question *for the first time,* namely, that petitioners were denied an opportunity to present evidence in open court to establish "that the parents are unfit to assume the duties and privileges of parenthood" (Pet., p. 14). Apart from the merits, this alleged infringement of procedural due process under the 14th Amendment was not presented to or passed upon by the court below.

The court below heard oral argument on the petition and return on April 25, 1956 (Docket Entry, Record) and no federal question was asserted when the court below announced that oral testimony would not be taken, the court having studied the petition and return following the filing of the return on April 23, 1956 (Pet., A1); no proffer of specific proof was made as required by state law, apart from the failure to raise a federal question; briefs were ordered to be filed by May 2, 1956, and no federal question was raised therein as to an alleged federal right to present oral testimony when filed on April 30, 1956 (Docket Entry, Record); on May 2, 1956, when the opinion and judgment were entered and when the motion for stay was presented in writing and orally, no federal question as to the alleged right to present oral evidence was raised (Docket Entries, Record and opinion below denying stay, Pet. A7). And, as suggested, the matter was not contained in the application for stay addressed to Mr. Justice Frankfurter. The "question" was not presented in or passed upon in the court below and this is fatal, particularly where "questions of pleading, evidence and the like" are involved. *Whitney* v. *California,* 274 U.S. 357, 362, 363 (1927).

The court below reviewed the pertinent facts alleged in the petition and return in the light of its knowledge of the facts in *Sklaroff* v. *Stevens,* 120 A.2d 694 and observed that reliance was being had by petitioners on alleged moral lapses of "four or five years ago and before their lawful marriage." (Petition, A2) Furthermore, the court pointed out that "the respondents in their return significantly allege no fact to show that since the marriage of petitioners in 1953 either of them has been guilty of any immoral or questionable conduct; or that they have failed to maintain a clean, com-

fortable, and proper home; or that they have not been kind and faithful parents bringing up their children properly in accordance with correct legal and moral standards; or that there is any existing fact by which petitioners are shown to be *presently* unfit and unable to discharge their parental obligations to this child according to law" (Pet., A4).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The provisions of the Constitution involved are set forth in the Petition at page 3.

2. (a) Massachusetts Statute governing placement of children: Annotated Laws of Mass., Chapter 119, sections 6, 8 (see Appendix B(a)).

(b) Massachusetts Legitimization Statutes: Annotated Laws of Mass., Chapter 190, sec. 7; Chapter 46, sec. 13, 2d para. (see Appendix B(b)).

(c) Rhode Island Legitimization Statute: General Laws, 1938, Chapter 424, sec. 13, (See Appendix B (c)).

(d) Rhode Island Adoption Statute: General Law, 1938, Chapter 422, Sec. 2, (See Appendix B (d)).

STATEMENT

The controversy here derives from resort by petitioners to illegal channels in the acquisition of the then illegitimate infant child of the respondents.

In August 1951 the petitioners herein gave a sum of money in cash to a Boston attorney for the purchase of the infant (Tr. 115, 428, 514). Their contacts with him were at his home in Mattapan, Massachusetts (Tr. 70, 106-107). Although the Boston lawyer had never seen the natural parents or represented them in any

capacity, he acted in concert with a Lynn, Massachusetts lawyer to whom some of the cash was given (Tr. 79-91, 104-116, 250). The money was paid to the Boston lawyer on or about August 26, 1951 (Tr. 514-515). Telephone calls to the petitioners on September 23 and September 25, 1951, directed them to Lynn, Massachusetts, where they made their first contact with the Lynn lawyer on the latter date (Tr. 515). He did not know their names or identity until then. (Tr. 516). They were directed to a place near his office to await physical delivery of the child yet with his natural mother in a Lynn hospital (Tr. 516-524).

Discharged from the hospital at about 5:30 P.M., the mother, in company with the natural father, who acted on directions, was driven to a point near the law office where they were ordered to follow the lawyer's car to another street (Tr. 573-574, 648-654). Here, under tearful protest of the emotionally disturbed and physically weakened mother, the baby was taken by the lawyer's secretary, in his presence, and transferred to his car (Tr. 247, 574, 648-654). The infant was then driven back to an area near the law office where he was removed by the woman secretary (Tr. 524). She then walked to the place where petitioners were waiting in their auto (Tr. 524-525). Petitioners did not know the identity of the woman secretary carrying the child. The infant was handed over to the petitioners by this unknown woman (Tr. 500-501). At dusk (Tr. 523) petitioners immediately transported the infant across the state line to their residence in Providence, Rhode Island, some sixty miles away (Tr. 526-527).

The Lynn lawyer had obtained the signature of the natural mother consenting to adoption while she was

recovering from childbirth in the Lynn hospital (Tr. 553, 564-567). He obtained the signature on a blank form printed for official use in the Juvenile Court of Rhode Island (Tr. 567). This form was completed under date of April 7, 1952, and filed by the petitioners in the Juvenile Court of Rhode Island on April 8, 1952. It was only then, through social welfare investigation, that the natural parents learned of the whereabouts of the infant (Tr. 586). Prior thereto the mother had made consistent efforts to obtain the child's return through the Lynn attorney, who purported to have the power so to do, but who was demanding varying amounts of money which he well knew could not be met (Tr. 657-660). "The mother of the child almost from the date she left the hospital after his birth has been fighting persistently and legally to obtain his return" (Pet., A4). "These efforts proved unsuccessful because certain substantial financial demands which apparently they could not meet were insisted upon as necessary to obtain the return of the child" (120 A.2d 694, 696; A10).

Upon the objection of the natural mother, the Juvenile Court took testimony which warranted the factual finding that there was "want of voluntary consent of the mother" (Pet. A18; 120 A.2d 694, 698).

Petitioners appealed to the Superior Court (Pet., p. 5). At the time of the birth of the infant and continuing until late April 1953, a valid legal impediment prevented the lawful marriage of the natural parents. This for the reason that under Massachusetts law the divorce decree of the natural mother did not become final until April 26, 1953. However, four days after the finality of the divorce decree, the natural parents were married at Lynn, Massachusetts, on

May 1, 1953 (Pet. H. C., Par. 7). Under Massachusetts law an illegitimate child is legitimatized by the marriage of his parents (Appendix B, (b) this Brief). Three days thereafter they went to the city clerk in Lynn and complied with the provisions of law affecting the change of name of the infant (Appendix B(b), this Brief; Pet. H. C., par. 8; Pet. A11). Efforts of the natural parents to obtain custody of the infant *pendente lite* or for right of visitation were effectively resisted (Ret. to W., par. 9). Respondents appeared in the Superior Court and objected to the adoption of their child (Pet. A11; 120 A.2d 694, 696, 699). Written consent of the natural father was never obtained (Pet. A16, A18; 120 A.2d 694, 698, 699).

Judgment was entered for petitioners and appeal was taken to the Supreme Court of Rhode Island on bill of exceptions to numerous rulings and denials of the trial court (Pet. H. C., par. 10).

On February 14, 1956, the Supreme Court of Rhode Island set aside the order of the Superior Court on the ground that the Superior Court had no jurisdiction because the statute governing adoptions required the voluntary consent in writing of both parents. The Court below charitably confined its discussion to "only the controlling facts concerning the motion to dismiss" (120 A.2d 694, 695; Pet., A9-10), stating:

> "We therefore intentionally omit, as far as possible, reference to all the remaining and extensive evidence, particularly that of two intermediaries residing in Massachusetts whose testimony is not free from suspicion, coercive inducement or other questionable conduct."

It was not until after this final judgment that a federal question was first suggested by petitioners on

application for stay (Pet. A17; 120 A.2d 694, 699). The unique constitutional right then asserted was a "claim of petitioners to a vested right in the child" (Pet. A17, 18; 120 A.2d 694, 699). This was denied (Pet. A17-19; 120 A.2d 694, 698-699). In accordance with the order of the Court below, decree dismissing for want of jurisdiction was entered in the Superior Court on March 21, 1956 (Pet. H. C., par 15). On April 3, 1956, decree was entered in the Juvenile Court denying and dismissing petition for adoption (Pet. H. C., par. 16). Certiorari was not sought.

Refusal of the petitioners to respond to request for the return of the infant forced the natural parents to seek his lawful surrender by petition for writ of habeas corpus filed in the Supreme Court of Rhode Island April 13, 1956. Instead of giving the opinion and judgment in the adoption case binding effect as to the law therein declared, a "lengthy and argumentative" Return was filed which renewed "in substance and effect the claims relied on to support their petition for adoption of this child, which petition was denied and dismissed in *Sklaroff* v. *Stevens,* R.I. 120 A.2d 694" and which contained

> "allegations of facts and law which are contrary to that decision; other allegations based upon a misconception of the Massachusetts statute under which petitioners legitimatized this child; and certain other assumptions, conclusions and argumentative assertions in an effort to support a unique claim that the child by his legitimization was deprived of rights under the due process clause of the 14th Amendment to the United States Constitution, and that the full faith and credit clause thereof was violated."

The return also asserted "certain alleged moral lapses by the petitioners which happened four or five years ago and before their lawful marriage" (Pet. A1-2). This return is the principal part of the record relied upon by petitioners.

After consideration of pleadings and briefs and oral argument, the court granted the petition on May 2, 1956, with an opinion which pointed out, among other things, that

> "the respondents in their return significantly allege no fact tending to show that since the marriage of petitioners in 1953 either of them has been guilty of any immoral or questionable conduct; or that they have failed to maintain a clean, comfortable and proper home; or that they have not been kind and faithful parents bringing up their children properly in accordance with correct legal and moral standards; or that there is any existing fact by which petitioners are shown to be *presently* unfit and unable to discharge their parental obligations to this child according to law." (Pet. A1-4).

The court further noted that no question of abandonment was involved:

> "The mother of the child almost from the date she left the hospital after his birth has been fighting persistently and legally to obtain his return. She has made reparation for her past misdeeds as far as it is humanly and legally reasonable to do so. Any present attachment of respondents is not chargeable to petitioners' abandonment or delay." (Pet. A1, A4)

In summary, petitioners acquired possession of the infant in violation of the Massachusetts Child Placement statute and without notice to the authorities

(Appendix B (a), this Brief). The consent of the mother was judicially found to have been obtained under circumstances negating her voluntary consent (Pet. A18; 120 A.2d 694, 699). It is conceded that the written consent of the father was never obtained (Appendix B (d), this Brief). The short of it is that petitioners resorted to illegal interstate channels to acquire the infant, a practice which has created such grave problems as to lead to inquiry by the Congress and compel the introduction of federal legislation (see Appendix A, this Brief).

ARGUMENT

1. Petitioners have no standing. There is no constitutional, statutory or common-law right of the petitioners affected by said judgment. Nor do petitioners seek protection of any such rights. Under state law the petitioners stand as strangers to the child. ". . . the [petitioners] are not related to him by blood or affinity. Nor do they have a decree or judgment of any court of competent jurisdiction which would clothe them with a present legal right to his custody" (Pet. A2).

One has no standing to assert the constitutional rights of another. "The prime object of all litigation is to establish a right asserted by the plaintiff or to sustain a defense set up by the party pursued. Save in a few instances where, by statute or the settled practice of the courts, the plaintiff is entitled to sue for the benefit of another, he is bound to show an interest in the suit personal to himself . . ." *Tyler* v. *Judges of The Court of Registration,* 179 U.S. 405 (1900); *Brown* v. *Smart,* 145 U.S. 454 (1892); *New York ex rel. Hatch* v. *Reardon,* 204 U.S. 152 (1907);

The Winnebago, 205 U.S. 354 (1907); *Tileston* v. *Ullman*, 318 U.S. 44 (1943); and see concurring opinion of Justice Frankfurter, *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 153-154 (1951).

Apparent exceptions to this rule, *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1924); *Truax* v. *Raich*, 239 U.S. 33 (1915); *Barrows* v. *Jackson*, 346 U.S. 249 (1953), are not applicable here. The party allowed to assert the constitutional rights of others has been permitted to do so only in those instances where necessary to protect some substantial legal interest of his own. In *Barrows* v. *Jackson* respondent was allowed to assert that the rights of non-Caucasians were violated. "There is such a close relationship between the restrictive covenant here and the sanction of the state which would punish respondent for not going forward with her covenant, that relaxation of the rule is called for here. It sufficiently appears that mulcting in damages of respondent will be solely for the purpose of giving vitality to the restrictive covenant, that is to say, to punish respondent for not continuing to discriminate against non-Caucasians in the use of her property." 346 U.S. at 258. Petitioners are not similarly situated. They have no substantial legal interest adversely affected by any alleged infringement of the child's rights.

Standing here should be governed by *Tileston* v. *Ullman, supra*, holding that a physician had no standing to litigate the constitutional validity of a statute prohibiting the use of drugs or instruments to prevent conception and the giving of assistance or counsel in their use where the complaint set out in detail the danger to the lives of his patients in the

event they should bear children but contained no allegation asserting any claim under the 14th Amendment of infringement of the physician's rights to liberty or property. The physician achieved no standing in *Tileston* merely because the statute applied directly to him. The fact that the mandate of the court below ran directly against the petitioners here is immaterial.

Petitioners lack of standing is self-evident when the nature of habeas corpus in a custody case is understood. If respondents had not prevailed below, it does not follow that petitioners would receive custody of the infant. The state court had power to award custody in the best interests of the child, not necessarily to one of the competing parties.

2. The decree awarding custody of the infant to his natural parents, after having determined that they had not abandoned him and that they were presently fit and able, raises no federal question and is not subject to review by this Court. (28 U.S.C.A., 2101(f)).

The Supreme Court of Rhode Island determined that under its law natural parents have a presumptive right to the custody of their children which can be overcome only by allegations and proof of present unfitness of natural parents or of abandonment of the child by natural parents. There was no allegation by petitioners in their Return of any fact which showed respondents were *presently* unfit to discharge their parental obligations (Pet. A4). In the absence of any assertion of present unfitness, the court below determined that the burden of overcoming the presumptive right of the natural parents had not been met and that custody should be awarded to the natural parents.

Further, in an earlier opinion denying adoption to petitioners, the court below stated: "There is also independent evidence to the effect that James and Catherine Skeadas have another child, Dennis George Skeadas, and that they maintain a clean and comfortable home in a good neighborhood." (Pet. A11)

Thus, it is clear that the case, as petitioners would have this court believe, was not one of admittedly unfit parents vying with admittedly fit challengers for the custody of the child, but on the contrary was the case of natural parents, whose present fitness had not been disputed, seeking to regain a child from strangers who had procured the child as a result of interstate negotiations among attorneys. Respondents pretermit the sordid manner in which the child was initially obtained by petitioners. The court below stated:

> "We therefore intentionally omit, as far as possible, reference to all of the remaining and extensive evidence, particularly that of two intermediaries residing in Massachusetts whose testimony is not free from suspicion, coercive inducement, or other questionable conduct. * * * It is unnecessary to relate how this attorney came to contact Catherine and what he did in conjunction with another attorney of Boston, Massachusetts, in placing the child with the Sklaroffs." (Pet. A10)

Petitioners' suggestion that the Rhode Island law of domestic relations has been changed by the instant case by the subordination of the welfare of the child to "merely biological claims to custody" (Pet., p. 14) ignores completely the universally accepted principle that the best interests of the child are presumed to be served by awarding custody to the natural parents. Cf. *People ex rel. Kropp* v. *Shepsky*, 305 N.Y. 465, 113

N.E. 2d 801 (1953); *Judd* v. *Van Horn*, 195 Va. 988, 81 S.E. 2d 432 (1954); *State ex rel. Fossen* v. *Hitman*, 154 Minn. 373, 205 N.W. 267 (1925).

In recognizing the presumptive right of the parents and in awarding custody to respondents in the absence of a showing of abandonment and unfitness, the court below applied principles of law accepted universally by the states. *People ex rel. Kropp* v. *Shepsky, supra; State ex rel. Fossen* v. *Hitman, supra; Judd* v. *Van Horn, supra; Stout* v. *Stout*, 166 Kan. 459, 201 P. 2d 637 (1949); *Blow* v. *Lottman*, —— S.D. ——, 59 N.W. 2d 825 (1953); *Stinson* v. *Meegan*, 318 Mass. 459, 62 N.E. 2d 113 (1945); *Lung* v. *Frandsen*, 155 Neb. 255, 51 N.W. 2d 623 (1952); *Parks* v. *Crowley*, 221 Ark. 340, 253 S.W. 2d 561 (1953); *State ex rel. Martin* v. *Garza*, 217 La. 532, 46 So. 2d 760 (1950); *Rodale* v. *Grimes*, 211 Ga. 674, 87 S.E. 2d 857 (1955); *Griggs* v. *Barnes*, 257 Ala. 21, 57 So. 2d 61 (1952); *Commonwealth ex rel. Harry* v. *Eastridge*, 374 Pa. 172, 97 A.2d 350 (1953); *Harper* v. *Tipple*, 21 Ariz. 41, 184 Pac. 1005 (1919); *Hardcastle* v. *Hardcastle*, 118 Utah 192, 221 P. 2d 883 (1950); *Ex parte Ward*, 39 Wash. 2d 894, 239 P. 2d 560 (1952); *Marcum* v. *Marcum*, 265 P. 2d 723 (Okla., 1954); *Stewart* v. *Stewart*, 41 Cal. 2d 447, 260 P. 2d 44 (1953); *Wright* v. *People*, —— Colo. ——, 279 P. 2d 676 (1955); *Horn* v. *Horn*, 5 Ill. App. 2d 346, 125 N.E. 2d 539 (1955); *Lavigne* v. *Family and Children's Society of Elizabeth*, 18 N.J. Super. 559, 87 A. 2d 739 (1952); *Starnes* v. *Jost*, 228 S.W. 2d 563 (Tex. C.A. 1950); *Reynolds* v. *Davidow*, 200 Miss. 480, 27 So. 2d 691 (1946).

Petitioners recognize that Rhode Island can without constitutional impediment determine, after hearing evidence, that the non-parents have not sustained the

burden resting on them to establish that the natural parents have abandoned their rights or that the natural parents are unfit to assume the duties and privileges of parenthood (Pet., p. 14). In the instant case Rhode Island treated all *pertinent* facts alleged in the Return as established (Pet. A2). No useful purpose would have been served by the submission of evidence as to facts which the court assumed to be established. No allegations were made, or proffer of specific proof tendered, of present unfitness. Hence, the instant case is no different from that which petitioners concede to be free from constitutional infirmities.

It is not strange, therefore, that petitioners' contention that the judgment below violates the infant's constitutional rights is both unique and unsupportable. Repeated decisions of this Court have asserted that "the whole subject of domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *Ex parte Burrus,* 136 U.S. 586, 593, 594 (1890); *Simms* v. *Simms,* 175 U.S. 162, 167 (1899); *State of Ohio ex rel. Popovici* v. *Agler,* 280 U.S. 379, 383 (1930); *Williams* v. *North Carolina,* 325 U.S. 226, 233 (1945); *Cf. Matters* v. *Ryan,* 249 U.S. 375, 377 (1919).

3. Petitioners seek to avoid the logical effect of these cases, *supra,* by claiming (1) that the action of Rhode Island in returning the child to his natural parents whose present fitness has not been attacked is a "monstrous cruelty" and hence deprives him of liberty without due process of law under the principles enunciated in *Rochin* v. *California,* 342 U.S. 165 (1951); and, (2), that the action of Rhode Island in recognizing that the child born illegitimate was

legitimatized by the subsequent marriage of his parents in Massachusetts also violates the due process clause.

Petitioners' contention that the action of the Rhode Island Supreme Court in returning the child to respondents constitutes a "monstrous cruelty" depriving him of liberty without due process of law may be simply answered by the fact that the return to the custody of his natural parents will not result in a "monstrous cruelty." In the case at bar the natural mother has been fighting persistently and legally to obtain the child's return almost from the date she left the hospital in September, 1951 (Pet. A4). Furthermore, as the court below stated:

> "In the instant case the respondents in their return significantly allege no fact tending to show that since the marriage of petitioners in 1953 either of them has been guilty of any immoral or questionable conduct; or that they have failed to maintain a clean, comfortable and proper home; or that they have not been kind and faithful parents bringing up their children properly in accordance with correct legal and moral standards, or that there is any existing fact by which petitioners are shown to be *presently* unfit and unable to discharge their parental obligations to this child according to law." (Pet. A4)

Under these circumstances to allege that any cruelty would result from awarding custody to respondents would be nothing more than sheer conjecture and is only a gratuitously asserted psychological prognostication. Courts have recognized that a child of tender years is able to adapt himself readily to a change in environment particularly when he is entrusted to the care of his natural parents. *Harvey Adoption Case,*

375 Pa. 1, 99 A. 2d 276 (1953); *Andrews Adoption*, 14 Pa. Dist & Co. 343.

In the second place, a child would not be deprived of liberty without due process of law if a state court erred when it determined the child's proper custodian. *Rochin* holds that brutal or shocking force asserted on the person to acquire evidence renders void a conviction based upon the use of that evidence. *Cf. People* v. *Haeussler*, 41 Cal. 2d 252, 260 P. 2d 8 (1953); *City of Barron* v. *Covey*, 271 Wisc. 10, 72 N.W. 2d 387 (1955); *Breithaupt* v. *Abram*, 58 N.M. 385, 271 P. 2d 827 (1954).

Coercion, violence and brutality were the bases for the *Rochin* decision. *Irvine* v. *California*, 347 U.S. 128, 133 (1954). These elements are totally lacking here. Certainly the action of Rhode Island in awarding custody of the infant to his natural parents cannot be compared with the action of the federal government in depriving negro children of the opportunity of securing a public education under the same conditions as white children. *Cf. Bolling* v. *Sharpe*, 347 U.S. 497 (1954). Petitioners, under the mask of the *Rochin* case, seek to have this Court adopt a certiorari policy which would inevitably require a finding of a violation of the 14th Amendment whenever this Court disagrees with a decision of the highest court of a state. Such a policy would produce havoc in the area where the state court sits as *parens patriae*. This court has consistently refused to adopt an absolutistic position as final arbiter as a matter of course of state law, *Wolf* v. *Colorado*, 338 U.S. 25 (1949); *Schwartz* v. *The State of Texas*, 344 U.S. 199 (1952).

Petitioners also contend that the infant is deprived of liberty without due process of law by the recognition

by Rhode Island of the legitimization of the infant born in Massachusetts of natural parents domiciled in Massachusetts who entered into a marriage in Massachusetts while still domiciled in that state. Petitioners contend that since the child was physically present in Rhode Island his constitutional rights were infringed by giving effect to the Massachusetts statute which legitimates a child upon the marriage of his parents. This contention assumes that there is no connection whatsoever between Massachusetts law and the status of the infant. It can be speedily answered. In the first place, it may well be argued that here national policy requires Rhode Island to give full faith and credit to the Massachusetts statute when that statute is not penal, is not contrary to the public policy of Rhode Island, and does not require a procedure for its enforcement for which the courts of Rhode Island are unsuited. *Hughes* v. *Fetter,* 341 U.S. 609 (1951); *Broderick* v. *Rosner,* 294 U.S. 629 (1935); *Cf. Carroll* v. *Lanza,* 349 U.S. 408 (1955).

The failure to give full faith and credit might result in a child being legitimate in one state and illegitimate in another, an undesirable result when, as petitioners point out, "When family life is fluid and interstate migration is the rule rather than the exception." (Pet., p. 20).

Olmsted v. *Olmsted,* 216 U.S. 386 (1910), is not inconsistent with this view. All that this Court stated in the *Olmsted* case was that New York was not required to give effect to a Michigan statute legitimatizing those born with the bar sinister upon the marriage of their parents when to do so would divest the title to real property situated in New York from third parties contrary to the public policy of New York.

The instant case neither involves the divestment of vested rights nor the application of law contrary to the policy of the forum. The policy of Rhode Island is squarely in accord with that of Massachusetts, each state having statutes providing that illegitimate children shall become legitimatized by the subsequent marriage of their parents (Appendix B (b) and (c) this Brief).

Secondly, if Rhode Island were not required to give full faith and credit to the Massachusetts statute, nothing in the 14th Amendment precludes Rhode Island from giving effect to it by comity. *Bank of Augusta* v. *Earle*, 13 Pet. 519 (1839); *Milwaukee County* v. *White Co.*, 296 U.S. 268 (1935). This is not a case where the law of a state is applied to a subject to which it has no reasonable relationship, e.g., *Western Union Telegraph Co.* v. *Kansas*, 216 U.S. 1 (1910). Here the child was born in Massachusetts, the marriage took place in Massachusetts, and significantly, the parents of the child were at all times domiciled in Massachusetts. It has been consistently held that the question of whether a child is legitimatized by the subsequent marriage of his parents is determined by the law of the domicile of those parents. *De Wolfe* v. *Middleton*, 18 R.I. 810, 26 A. 44, 31 A. 271 (1893); *Blythe* v. *Ayres*, 96 Cal. 532, 31 P. 915 (1892); *Ives* v. *McNicoll*, 59 Ohio St. 402, 53 N.E. 60 (1899); *Caballero* v. *Executor*, 24 La. Ann. 573 (1872); *Adams* v. *Adams*, 154 Mass. 290, 28 N.E. 260 (1891); *Fowler* v. *Fowler*, 131 N.C. 169, 42 S.E. 563 (1902); *Re Wray's Estate*, 93 Mont. 525, 19 P. 2d 1051 (1933); *Peirce* v. *Peirce*, 379 Ill. 185, 39 N.E. 2d 990 (1942); *Smith* v. *Kelly*, 23 Miss. 167, 55 Am. Dec. 87 (1851); *Thorn Estate*, 353 Pa. 608,

46 A. 2d 258 (1946); *Smith* v. *Mitchell*, 185 Tenn. 37, 202 S.W. 2d 979 (1947).

In utilizing the law of the domicile of the parents to determine the issue of legitimacy, state courts have done nothing more than follow this Court's decision holding that the status of a minor is ordinarily determined by the law of the father's domicile, not the place of the child's residence. *Yarborough* v. *Yarborough*, 290 U.S. 202, 211 (1933). Presumably petitioners contend that the application of this settled law would be unconstitutional for the reason that the infant was physically located in Rhode Island. No such exception is recognized in the cases. If, however, the place of the child's residence is to be the basis for the choice of which law will govern legitimization petitioners stand in no better position. The law of Rhode Island is in accord with that of Massachusetts, and hence if the domestic law of Rhode Island is applied, the child is still legitimate (Pet. A12; Appendix B(c), this Brief).

Even if it be assumed that Rhode Island improperly treated the child as legitimate, petitioners cannot meet the claim of the natural mother to custody. If the natural mother had been the sole petitioner in the habeas corpus proceeding, she would have been entitled to custody, there being no showing of abandonment or present unfitness. Thus it is of no concern to petitioners that the court below vested custody in respondents.

Finally, assuming that Massachusetts law has been erroneously applied to legitimatize the infant, no deprivation of a right has occurred as a result of changing his status from that of an illegitimate to that of a legitimate child.

To hold that the petitioners are entitled to relief against the decree below would be tantamount to holding that, whenever adoption is denied, the disappointed parties could circumscribe traditional state power over children solely on a claim of harm to the child.

CONCLUSION

For the foregoing reasons, it is abundantly clear that the decision below is correct, and that no substantial federal question has been raised. The petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX A

The subject of baby brokerage, including state policy in the field as well as interstate aspects, is currently receiving the attention of Congress. Evidence developed before a special Subcommittee of the Judiciary Committee of the United States Senate has indicated a nation-wide pattern of commercial dealings in placement of children. See S. 2281, 84th Cong., 1st Sess.; S. 1123, 84th Cong., 1st Sess.; S. 3021, 84th Cong., 2d Sess. See Hearings Before Subcommittee to Investigate Juvenile Delinquency of the Committee of the Judiciary, U. S. Senate (pursuant to S. Res. 62, 84th Cong., 1st Sess.), July 15 and 16, 1955, entitled "Interstate Adoption Practices"; Nov. 14 and 15, 1955, entitled "Interstate Adoption Practices—Miami, Florida." Further hearings are being heard currently.

The typical case disclosed by these records involves a lawyer-broker, to whom cash is paid, overseeing transfer of a child without approval of state courts and agencies at a time of high emotion, impecuniousness and bewilderment on the part of the natural parents. Need for legislation, where interstate movement is involved, has been voiced by Congress, *Cong. Record*, Jan. 23, 1956, pp. 873-874. In addition to civil problems, family relations and inheritance, criminal dangers such as blackmail and resort to underworld techniques are attendant upon commerce in infants. To aid the states in solving this problem, S. 3021, 84th Cong., 2d Sess., has been introduced prohibiting transfer and placement of children across state lines *prior to* investigation and approval by the state in which the child will reside. The sponsor of the bill stated:

> ". . . The proposed legislation is not intended in any way to remove or interfere with the basic responsibility of the state in dealing with adoptive matters. . . . Rather, it is intended to combat those situations which are beyond the control of the states and to eliminate the tragic and sordid interstate traffic in children." Cong. Record, 84th Congress, 2d Sess., p. 873, Jan. 23, 1956.

APPENDIX B

(a) Massachusetts Statute governing Placement of Children: Annotated Laws of Mass., Ch. 119, Sec. 6:

"Whoever receives under his care or control, and whoever places under the care or control of another for compensation, an infant under fourteen years of age, not related by blood or marriage to the person receiving it, shall, within two days thereafter, give notice thereof, and of the terms upon which such infant was received, to the department [of public welfare], with the name, age, and residence of the infant, its parents, and the person from whom and by whom received; but if such an infant under two years of age was received from the board of public welfare of any town, or from the institutions department of Boston, or from any charitable corporation organized under the laws of the commonwealth, or from any municipal veterans' service department, such notice may state only the name and age of such infant and the name and location of the board, department or corporation from which received."

Chapter 119, Sec. 8:

"Whoever neglects to give the notice required by section six or refuses to give information upon request of the department, its officers or agents, or fails to comply with the orders of a court made in accordance with the preceding section [relating to judicial orders for custody] shall, upon complaint of the department be punished by a fine of not more than one hundred dollars or by imprisonment for not more than one year, or both."

(b) Massachusetts Legitimization Statutes: Annotated Laws of Mass., Chapter 190, Sec. 7:

"An illegitimate child whose parents have intermarried and whose father has acknowledged him as his child or has been adjudged his father under chapter two hundred and seventy-three shall be deemed legitimate and shall be entitled to take the name of his parents to the same extent as if born in lawful wedlock."

Chapter 46, Sec. 13, 2d para.:

"If a person shall have acquired the status of a legitimate child by the intermarriage of his parents and the acknowledgement of his father or an adjudication of paternity under chapter two hundred and seventy-three, as provided in section seven of chapter one hundred and ninety, the record of his birth shall be amended or supplemented as hereinafter provided so as to read, in all respects as if such person had been reported for record as born to such parents in lawful wedlock." (Remainder of Section 13 not reproduced.)

(c) Rhode Island Legitimization Statute: Chapter 424, Section 13, General Laws of Rhode Island, 1938, as amended by Public Laws, 1944, Chapter 1394:

"Illegitimate children shall become legitimatized by the subsequent marriage of their parents to each other and issue of marriages declared null in law shall nevertheless be legitimate, and in such case the city or town clerk having custody of the birth records at the request of either parent, or the child so legitimatized, shall make any changes necessary in order to remove from said records any evidence of illegitimacy."

(d) Rhode Island Adoption Statute: Chapter 422, Section 2, General Laws of Rhode Island, as amended by Public Laws, 1944, Chapter 1441, Sec. 36:

"The parents of the child, or the survivor of them, shall, except as herein provided, consent in writing to such adoption, or such petition shall be dismissed." (Remainder of section not reproduced.)